

Office Supreme Court, U. S.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1923.

**No. 421**

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,  
Appellants,

*versus*

MORGAN'S LOUISIANA AND TEXAS RAILROAD  
AND STEAMSHIP COMPANY,  
Appellee.

Appeal from the District Court of the United States for  
the Eastern District of Louisiana.

ORIGINAL BRIEF ON BEHALF OF MORGAN'S  
LOUISIANA AND TEXAS RAILROAD AND  
STEAMSHIP COMPANY, APPELLEE.

GEORGE DENEGRÉ,  
VICTOR LEOVY,  
HENRY H. CHAFFE,  
HARRY McCALL,  
JAS. HY. BRUNS,

Attorneys.

DENEGRÉ, LEOVY & CHAFFE,  
Of Counsel.



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STEAMSHIP COMPANY, APPELLEE.**

---

**STATEMENT OF THE CASE.**

This is a suit in which the Morgan's Louisiana and Texas Railroad and Steamship Company, a Louisiana corporation

(hereinafter referred to as Morgan Company), seeks to have set aside an order of the Louisiana Public Service Commission (hereinafter referred to as Commission), and in which it prayed for an interlocutory, and after final hearing, a permanent injunction restraining the Commission, its members and attorneys (all also citizens and residents of the State of Louisiana) from enforcing or attempting to enforce the order complained of.

From a decree rendered by their Honors, Bryan and King, Circuit Judges, and Foster, District Judge, on May 23, 1923 (Tr., 178), ordering that an interlocutory injunction issue, as prayed for, the Commission, its members and attorneys have taken this appeal.

The first twelve pages of the brief filed herein on behalf of the Commission contain a correct summary of the pleadings filed and proceedings had in the District Court, so we will not burden the Court with a detailed repetition thereof here, but from which it appears, as alleged, that this is a controversy between citizens of the same State, arising under the Constitution and laws of the United States and that the amount in controversy is in excess of five thousand dollars.

The admissions in defendant's answers, coupled with the uncontradicted affidavits, ordinances and exhibits, prove the following facts:

On April 11, 1878, the Morgan Company acquired by fee simple title a strip of land in the City of New Orleans



(Fifth District, known as Algiers), measuring 375 feet front on the Mississippi River by 24 arpents (about 4600 feet) in depth between parallel lines. (Tr., 11.)

For more than forty years this strip of land has been under fence, in the sole and exclusive possession and control of the Morgan Company, and the public has been excluded therefrom, except for a traffic viaduct at Patterson Street (which is immediately behind the levee forming the bank of the Mississippi River), a foot viaduct at Eliza Street, neither of which are involved in this controversy, and except for the viaduct at Newton Street, which is the viaduct involved in this controversy.

No street, roadway or crossing has ever been expropriated or otherwise acquired across this property, and no right to cross the property has ever been granted or permitted except at Patterson Street and Eliza Street (which are not involved in this case), and except at Newton Street. (Tr., 49, 54, 55, 57, 58, 59.) The statement of the Commission in its opinion, found on pages 144 and 147 of the transcript, that the construction of the viaduct was made necessary by the closing of streets from upper to lower Algiers, is incorrect, and there is no proof in support thereof. The occasion for constructing the viaduct was the closing of Patterson Street by the United States when it built the navy yard in Algiers. (Tr., 90.)

In the year 1904 the City of New Orleans advertised for sale a franchise for the operation of a street railroad

in that portion of the city known as Algiers. Among other provisions this franchise contains the obligation on the part of the adjudicatee to operate its street railroad across the above-mentioned property on a viaduct (which the city guaranteed to provide) and to pay during the life of the franchise (50 years) the cost of maintaining all parts of the viaduct. (Tr., 17.)

This franchise was adjudicated to Messrs. Carroll and Dinkins and by them transferred to the Algiers Railway and Lighting Company. (Tr., 23.) In 1905 the City of New Orleans obtained from the plaintiff, by contract, the right to cross the above-mentioned strip of land at Newton Street with a viaduct, conditioned on the city paying the cost of erecting the viaduct and thereafter the cost of maintaining it (Tr., 14, 49), and in 1907 the viaduct was constructed.

The franchise held by the Algiers Railway and Lighting Company was sold under foreclosure proceedings and acquired by a man by the name of Ballard, who in 1917 transferred same to the South New Orleans Light & Traction Company, which company thereby assumed all of the obligations imposed by said franchise upon the holders thereof. (Tr., 182.)

The South New Orleans Light and Traction Company from 1917, up to the summer of 1922, operated its street railroad cars over and across the entire length of the viaduct (Tr., 96), and at various times made repairs thereto.

(Tr., 56.) The viaduct is some two thousand feet in length and extends for several hundred feet on each side of and beyond the two sides of the Morgan Company's property, hereinabove referred, over and along Newton Street on the upper side, and General Meyer Avenue on the lower side, completely blocking those two streets. (Tr., 49.) At the time of the hearing in the District Court the South New Orleans Light & Traction Company was operating its cars on and across all of the viaduct except about 435 feet thereof, over which its passengers were being transferred on foot on the viaduct from car to car.

The City of New Orleans is not seeking to set aside either the contract with the Morgan Company whereby it obtained the right to cross to Morgan Company's property, under the condition that it, the city, would maintain the viaduct or the contract with the South New Orleans Light and Traction Company as the transferee of the franchise granted to Messrs. Dinkins and Carroll, under which the South New Orleans Light and Traction Company is obligated to maintain the viaduct. In fact the city has, by ordinance, instructed the City Attorney to bring suit to recover from the South New Orleans Light & Traction Company some \$6,600.00 which the city had expended in repairs. (Tr., 27, 39.)

The present viaduct at Newton Street, if kept in repair, is now and will be for many years to come, amply sufficient to care for traffic of all kinds, characters and description, including street railroad traffic. This viaduct, as above

stated, extends beyond the plaintiff's property a distance of several hundred feet along and over Newton Street, a public street, completely blocking same for all practical use and preventing its use for any other purpose. Any other viaduct erected across the plaintiff's property to take care of the traffic would likewise block Newton Street for a similar distance and prevent its use for any other purpose. (Tr., 51.)

The cost to the Morgan Company to comply with the order complained of would exceed the sum of \$48,000.00 (Tr., 169).

The order complained of in the original bill reads as follows:

"Ordered that the Morgan's Louisiana and Texas Railroad and Steamship Company be and it is hereby commanded and required to provide a safe and suitable traffic viaduct over and across its tracks, facilities and properties in the Fifth District of the City of New Orleans (Algiers); the said viaduct herein ordered to commence at a point on Newton Street (Algiers) a sufficient distance from the properties of the M. L. & T. R. R. & S. S. Co. to provide suitable and proper grades for traffic thereover; all to be in accordance with plans and specifications which are hereby required to be filed with this Commission for its approval within 30 days from the date of this order; and it is further ordered, that within 90 days from the date of the approval of the plans herein required to be filed by this Commission that the

said M. L. & T. R. R. & S. S. Co. complete and open for traffic to the public the viaduct herein required."

After the decree of the three-judge Court ordering the issuance of a temporary injunction restraining the Commission, its members and attorneys from enforcing, or attempting to enforce, the foregoing order, the Commission reopened the proceedings before it and rendered the order now complained of, which order reads as follows:

"Ordered, that within fifteen days from the date of this order the Morgan's Louisiana & Texas Railroad & Steamship Company shall commence to repair and put in a safe and suitable condition for vehicular and other traffic, such repairs to be completed within a reasonable time thereafter, the existing viaduct over, above and across the properties of the said Morgan's Louisiana & Texas Railroad & Steamship Company in the Fifth Municipal District of the City of New Orleans, known as Algiers, within the limits of the said property, which connects the two ends of Newton Street, and thereafter to maintain the same in a safe and suitable condition. This order shall become effective at once.

"All orders in conflict herewith are canceled, rescinded and annulled." (Tr., 170.)

The Morgan Company, in its original and supplemental bills of complaint, contends that this order is illegal, unconstitutional, arbitrary, unjust, unreasonable, null and void for the following reasons:

(a) Said order deprives petitioner of its property without due process of law, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, and of Section Two of Article One of the Constitution of the State of Louisiana, adopted in the year 1921, in that it requires petitioner to devote its private property to the public purposes aforesaid without any compensation therefor.

(b) Said order denies to petitioner the equal protection of the laws, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, in that it requires petitioner to devote its private property to the public purposes aforesaid without any compensation therefor, whereas under the Constitution and laws of the State of Louisiana petitioner's property cannot be taken for said public purposes except after just and adequate compensation is made therefor, and if the said Constitution and laws, either or both, provide to the contrary, then same are unconstitutional, null and void, being in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States as aforesaid.

(c) Said order impairs and renders null and void and of no effect the obligations of the City of New Orleans under the contract above mentioned existing between the City of New Orleans and petitioner, under which said city acquired the right to cross petitioner's said tract of land, in violation of Section Ten of Article One of the Constitution of the United States.

(d) Said Commission in rendering said order claims to be acting within the scope of authority and jurisdiction of Section Three of Article Six of the Constitution of the State of Louisiana, adopted in the year 1921, whereas neither the provisions thereof nor any other law of the State of Louisiana confers upon said Commission the power, authority or jurisdiction to render such an order as the one herein complained of, and said Commission was, and is, without power, authority or justification to render the order complained of.

(e) Said order requires that use be made of part of the public streets of the City of New Orleans, and attempts to regulate the same and control the use thereof, and **said order attempts to make part of the public streets of the City of New Orleans that portion of said viaduct referred to in said order** and to control the character, use and maintenance thereof and regulate the same, jurisdiction over which and jurisdiction to do which is vested exclusively in said City of New Orleans, and said Commission is without power, jurisdiction or authority so to do.

(f) Said order releases and extinguishes the obligations of the South New Orleans Light & Traction Company to the City of New Orleans to maintain in all its parts the viaduct constructed by said City of New Orleans as aforesaid, and places upon petitioner the burden of maintenance aforesaid in violation of the provisions of Section Thirteen of Article Four of the Constitution of the State of Louisiana,

adopted in the year 1921, and the aforesaid provisions of the amendments to the Constitution of the United States.

(g) Said order is unjust, arbitrary and unreasonable and there is no public necessity therefor, and constitutes an unreasonable interference with and burden upon interstate and foreign commerce, contrary to Section Eight of the Constitution of the United States giving to the Congress of the United States power to regulate commerce with various nations and among the several States, and the provisions of the Transportation Act of 1920, enacted under the authority thereof, as well as in violation of the Fourteenth Amendment to said Constitution, in that it deprives petitioner of its property without due process of law.

(h) Said order constitutes the taking of petitioner's property without compensation for the benefit of the South New Orleans Light & Traction Company without compensation to petitioner, in violation of the Fourteenth Amendment to the Constitution of the United States and Section Two of Article One of the Constitution of the State of Louisiana, in that it deprives petitioner of its property without due process of law, and denies to petitioner the equal protection of the law in that under the laws of the State of Louisiana the South New Orleans Light & Traction Company before acquiring or obtaining any right to cross petitioner's property other than that acquired by the franchise under which it is operating as aforesaid has the right to and is obligated and required to expropriate the right so to do and to pay to petitioner in advance of the



taking or acquiring thereof a just and adequate compensation therefor.

The application for an interlocutory injunction was heard before a three-judge Court, consisting of their Honors, Bryan and King, Circuit Judges, and Foster, District Judge, who for written reasons, found in the transcript at pages 151 and 178, unanimously ordered that the writ issue as prayed for.

From this decree the Commission, its members and attorneys have taken this appeal.

### ARGUMENT.

#### (A)

It is alleged in the bills filed herein that this is a controversy between citizens of the same State arising under the Constitution and laws of the United States and that the amount in controversy is in excess of five thousand dollars (Tr., 8, 162).

From the foregoing statement of the pleadings and facts we believe it is too clear to require argument that Federal jurisdiction exists. Their Honors, Judges Bryan, King and Foster, so considered it, and the Commission has not even questioned it.

Under the well-settled jurisprudence of this Court, as this Court has jurisdiction of the case, it has power to decide all questions involved. We will, therefore, discuss

the issues in what seemed to us, and to the trial Court, to be their logical order, namely:

*First.* Has the Louisiana Public Service Commission, under the laws of Louisiana, the power to render the order complained of, and

*Second.* If it be held to have that power, is the order complained of a valid exercise thereof?

**(B)**

**HAS THE LOUISIANA PUBLIC SERVICE COMMISSION, UNDER THE LAWS OF LOUISIANA, THE POWER TO RENDER THE ORDER COM-  
PLAINED OF?**

In considering this question we ask the Court to bear in mind the following cardinal facts:

*First.* The viaduct in question is within the corporate limits of the City of New Orleans.

*Second.* The right to cross the Morgan Company's property with the viaduct was granted to the City of New Orleans under the condition that the city maintain it, which condition the Commission, by its order, has attempted to wipe out.

*Third.* The viaduct, subject to the condition that the city maintain it, now forms part of the public streets of the City of New Orleans.

As to these three premises there can be no reasonable dispute, the evidence in support thereof being uncontradicted.

We take it that it is well settled that it is only by the exercise of the police power and in order to promote the safety and convenience of the public, and then only in a proper case, that a railroad company can be required to build and thereafter maintain a viaduct across its tracks or to maintain an existing viaduct across its tracks.

We take it also as axiomatic that, while the right to exercise the police power of the State cannot be contracted away, it is within the power of the State to select which of its subordinate bodies or officials shall exercise its police power in any given situation or within any particular territorial limit of the State and to delegate to that subordinate body or official the sole and exclusive right and power to exercise the police power of the State, either to accomplish certain purposes or within certain territory for all or any particular purposes.

In other words, it cannot be that every board, commission or public official constituting part of a State's government is clothed with the right and power to exercise the police power of the State in all its various phases, because, if that were so, then what might seem to one board, commission or public official as necessary and proper for the public health, safety or convenience, might seem to another board, commission or public official either inadequate, un-

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necessary or inimical to the health, safety or convenience of the public, and such a situation would bring about the greatest confusion and conflict.

The Louisiana Public Service Commission contends that the right and duty to exercise the police power of the State of Louisiana, within the territorial limits of the City of New Orleans, for all purposes has been delegated to it, whereas we contend that the right and duty to exercise the police power of the State over steam railroads within the territorial limits of the City of New Orleans, in so far as the safety and convenience of the public, the use by steam railroads of the streets and the grade, of and opening and maintaining streets are concerned, has been delegated to the duly elected officials of the City of New Orleans, to-wit: the Mayor and Commission Council.

If the Louisiana Public Service Commission be correct in its contentions then it, and not the Commission Council, is clothed with the power and duty to regulate in the City of New Orleans the speed of trains, how long trains passing through the city streets shall be, for what duration streets may be blocked by trains, whether or not and where whistles may or shall be blown or bells rung, whether railroad crossings shall be protected by gates, flagmen or bells, what streets, if any, railroads shall be permitted to operate on or across, and finally what streets shall or shall not be kept in repair by steam railroads and what shall constitute proper repair.

By its own order the Commission recognizes that Newton Street does not cross the Morgan Company's property, as it describes the viaduct in question as the one "which connects the two ends of Newton Street," so that what it is also attempting to do is to incorporate, without condition, as part of the public streets of the City of New Orleans, that part of the viaduct which stands over defendants' property, which is the same thing as opening a street across defendants' property and regulating the repair thereof. If this is not true then the order is so manifestly absurd as to be indefensible on any ground because it would require the Morgan Company to repair and maintain a portion of a viaduct some twenty feet up in the air, which led nowhere and for which there would, and could be, no use, as there would be no approaches thereto.

In the trial Court, in argument, it was vehemently contended that the only purpose of the Commission in entertaining jurisdiction in this cause was to furnish to the public as speedily as possible a means of crossing the Morgan Company's property. An examination of the record will show that this contention is not well founded, because on November 3, 1922, the attention of the Commission was called to the fact that the officials of the City of New Orleans had the matter in hand, and a continuance was asked in order that the City of New Orleans could bring about a solution, whereupon Commissioner Williams of the Louisiana Public Service Commission declined to grant the continuance, saying in part (Tr., 103):

"We believe it is essential that the matter of jurisdiction be settled once and for all in order

that there may continue to be a proper functioning of the Public Service Commission."

\* \* \* \* \*

"It is possible that questions have arisen here which are more fundamental and important to the people of the City of New Orleans and Algiers, and the State as a whole, for that matter, than even a continuance, for the time being, of this inconvenience to the people of Algiers, etc."

In the case at bar it is not necessary to determine what are, in general, the power and duties of the Commission and to fix their limits. It is merely necessary to determine whether to the Louisiana Public Service Commission or to the duly elected officials of the City of New Orleans has been delegated the authority and duty to exercise, within the territorial limits of the City of New Orleans, the police power of the State over steam railroads in so far as their operation affect the safety of the public and whether to the Louisiana Public Service Commission or to the officials of the City of New Orleans has been delegated the authority and duty to open or repair streets across property owned by a steam railroad company.

The power and authority of the Louisiana Public Service Commission pertinent to this case are conferred by Sections 4 and 9 of Article VI of the Constitution of Louisiana adopted in 1921, which sections read as follows:

Section 4. "The Commission shall have and exercise all necessary power and authority to **super-vise, govern, regulate and control all common carrier railroads**, street railroads, interurban rail-

roads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipe lines, canals (except irrigation canals) and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

"The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. The right of the Legislature to place other public utilities under the control of and confer other powers upon the Louisiana Public Service Commission respecting common carriers and public utilities is hereby declared to be unlimited by any provision of this Constitution.

"The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and mode of procedure as it may deem proper for the discharge of its duties, and it may summon and compel the attendance of witnesses, swear witnesses, compel the production of books and papers, take testimony under commission, and punish for contempt as fully as is provided by law for the District Courts." (Black letters ours.)

Section 9. "Until otherwise provided by the Legislature all laws enacted by the General Assembly of the State of Louisiana since the adoption

of the Constitution of 1898, and in effect at the time of the adoption of this Constitution, affecting, concerning or relating to the Railroad Commission of Louisiana, not inconsistent with any of the provisions hereof, shall be construed as referring and applying to the Louisiana Public Service Commission, and nothing in this Constitution shall be construed as in any manner impairing or affecting such laws."

These powers are substantially the same, in so far as this case is concerned, as the powers conferred on the Louisiana Railroad Commission by Article 284 of the Constitution of 1913, the pertinent part of which reads as follows:

"Art. 284. The power and authority is hereby vested in the Commission, and it is hereby made its duty \* \* \* to govern and regulate railroads, etc."

The pertinent provisions of Article 284 of the Constitution of 1898, by which the Railroad Commission of Louisiana was created, are identical with those of the Constitution of 1913, and read as follows:

"Art. 284. The power and authority is hereby vested in the Commission, and it is hereby made its duty \* \* \* to govern and regulate railroads, etc."

The only difference between the Constitutions of 1898 and 1913 on the one hand and the Constitution of 1921 on the other, is in language and not in power, because the grant of the power to "govern and regulate" includes the right to "supervise and control." So, we submit, that the



three-judge court was correct in stating that "there is no appreciable difference in the authority of the two commissions."

And yet neither the law-making power nor the Railroad Commission itself considered that by the Constitution the power was conferred on the Commission to require railroads to provide overhead or underground crossings at even existing public crossings. This is evidenced by the fact that the Legislature felt it necessary to confer such power, and felt authorized to place such restrictions thereon as it saw fit, by Act 132 of 1918, the pertinent parts of which act read as follows:

**Section 1.** "Be it enacted by the General Assembly of the State of Louisiana, **that the powers and duties of the Railroad Commission of Louisiana are hereby added to and enlarged;** and the power and authority is hereby vested in the said Commission, and it is hereby made its duty to require the owner, possessor or operator of any railway, railroad, tram road, log road, transportation, irrigation or drainage canal, or syphon, crossing any public road already constructed or which may hereafter be constructed, to construct and maintain a suitable and convenient crossing over such public road, the said crossing to extend to the limits of the right of way, or fifty feet from the center of such railway, railroad, tram road, log road, transportation, irrigation or drainage canal or syphon, in accordance with the standard specifications furnished by the State Highway Department of the Board of State Engineers in respect to such crossings."

**Section 2.** "Be it further enacted, etc., That the Police Juries of the respective parishes of this State shall certify to the Railroad Commission of Louisiana any case where any railway, railroad, tram road, log road, transportation, irrigation or drainage canal, or syphon, has not constructed or maintained or refuses to construct and maintain, a crossing over a public road in accordance with the standard specifications of the State Highway Department of the Board of State Engineers, in respect to such crossings; whereupon, the Railroad Commission of Louisiana shall enter an appropriate order requiring such crossing to be constructed in accordance with the standard specifications of the State Highway Department of the Board of State Engineers in respect thereto."

**Section 3.** "Be it further enacted, etc., That the orders of the Railroad Commission shall be enforced in the manner provided by Articles 284 to 289 of the Constitution of the State of Louisiana as amended, by the imposition of the penalties provided therein for violations of the orders of the Railroad Commission of Louisiana." (Black letters ours.)

The Railroad Commission itself recognized that, previous to the passage of this act, it had no such jurisdiction, by stating in its order, quoted at length in *Gulf C. & S. F. Ry. Co. v. Louisiana Public Service Commission*, 151 La., 635 (92 Southern, 143):

"This is a proceeding which was filed with the Commission on January 21, 1921, under the provisions of Act 132 of 1918, etc."

Had it been considered that jurisdiction and power to order the doing of the things there ordered had been conferred by the Constitution the Commission would not have stated, as a preamble to its order, that the proceedings were brought "under the provisions of Act 132 of 1918."

In the just-above-mentioned case (*Gulf C. & S. F. Ry. Co. v. Louisiana Public Service Commission*, 151 La., 635), the Supreme Court of the State of Louisiana was called on to decide whether or not, under the Constitution and laws of the State of Louisiana, the Louisiana Public Service Commission has the power to require a railroad company to build an overhead crossing in the country and thus eliminate a grade crossing.

The Court did not hold, as is contended for on page 22 of appellant's brief, that the Commission was granted such power by the Constitution of the State, but it did hold that under the provisions of Section 4, coupled with the special authority conveyed by Act 132 of 1918, the Commission had such power.

Had the Court been of the opinion that the Constitution itself conveyed such authority it would have so held and no mention would have been made of Act 132 of 1918, whereas its whole decision is based on the fact that the authority there exercised was derived from Act 132 of 1918, thereby in effect holding that in the absence of the Act of 1918 the Commission would not have been held to have the authority there sought to be exercised.

Act 132 of 1918 is, by its very terms, restricted to crossings of public roads, and it is only applicable and the authority thereby conveyed on the Commission can only be exercised when the Police Jury (the governing body of the respective parishes in the State of Louisiana) has certified to the Commission that a crossing over a public road in accordance with the standard specifications of the State Highway Department of the Board of State Engineers is needed. By specifying the particular conditions under which the power granted by the act shall be exercised by the Commission, the Legislature clearly indicated that under no other conditions should the power be exercised. *Expressio Unius est Exclusio Alterius*, and by providing that such power should be exercised only on the certificate of the Police Juries of the respective parishes of the State of Louisiana the Legislature clearly indicated that the terms of the act should not apply to the Parish of Orleans, in which the City of New Orleans is located, for the reason that no Police Jury exists in the City of New Orleans, the governing body of the parish being the Commission Council of the City of New Orleans.

The grant of power contained in Act 132 of 1918 therefore cannot avail the Railroad Commission in the case at bar for the following reasons:

(1) The act clearly refers to existing public crossings to which the public has the unconditional right, whereas the right of the public to cross on the viaduct in question is conditioned upon the city maintaining it;

(2) The act refers to public crossings in the country and not in the City of New Orleans;

(3) The act refers to crossings to be constructed in accordance with the standard specifications furnished by the State Highway Department of the Board of State Engineers, whereas the viaduct in question was constructed in accordance with plans prepared by the City of New Orleans;

(4) The act authorizes the Public Service Commission to exercise the authority therein conveyed only when petitioned so to do by the Police Jury of the respective parishes, whereas in the case at bar, not only did the city not petition the Commission to render the order complained of, but it contends that it has the sole and exclusive jurisdiction over the viaduct in question;

(5) The act refers to crossings of public roads, whereas subject to the condition that the city maintain the viaduct, the viaduct forms part of the public streets of the City of New Orleans.

The Commission itself and the Supreme Court of the State of Louisiana having recognized that, independent of Act 132 of 1918, the Louisiana Public Service Commission has no power to render an order requiring the construction of an overhead crossing on a public road, it necessarily follows, as the act does not apply to the viaduct in question, that, unless some other statute or constitutional provision is pointed out, that the Commission has not the authority to render the order complained of, none are pointed out

because none exist. The conclusion of the three-judge Court in this regard was correct.

In addition to the reasons set forth above the above-quoted provisions of the Constitution of 1921, and the Act of 1918 must be construed in conjunction with the provisions of Section 22 of Article 14 of the Constitution of the State of Louisiana for the year 1921, the pertinent parts of which read as follows:

"The electors of the City of New Orleans and of any political corporation which may be established within the territory now or which may hereafter be embraced within the corporate limits of said city shall have the right to choose their public officers. \* \* \* This section \* \* \* shall not prohibit \* \* \* the Legislature from appointing or authorizing the appointment of any Board or Commission with full authority in the City of New Orleans other than that of controlling the ordinary governmental functions of municipal government."

Now, not only are the safety and convenience of the public and the control of the streets and their use and repair ordinary governmental functions of municipal government, but they are among the prime motives for the creation of municipalities.

Construing these sections of the Constitution together and in relation to each other it seems to us clear that it was the intention of the framers of the Constitution that the authority to exercise the police power, as it is here sought

to be exercised, was delegated to the Commission Council of the City of New Orleans and not to the Louisiana Public Service Commission.

It is to be noted that Section 22 of Article XIV of the Constitution of 1921 refers specifically to the City of New Orleans, thus setting it apart from the other portions of the State. The reason for thus providing is clear. The City of New Orleans is the only large city in the State of Louisiana. It, of necessity, is confronted with many problems peculiar to a large city, and in no way affecting the balance of the State. The framers of the Constitution, therefore, acted wisely in leaving it to the City of New Orleans to solve its own problems, and relieving it of the domination and control of outside bodies and officials, probably not conversant or alive to its real needs.

In construing articles in the Constitutions of 1898 and 1913, similar to Section 22 of Article XIV of the Constitution of 1921, the Supreme Court of Louisiana said, in *Board of Public Utilities v. New Orleans Ry. & Lt. Co.*, 145 La., 308 (314):

"Articles 319 and 320 of the Constitution of 1898, incorporated as Article 319 of the Constitution of 1913, provide a rule of local self-government **peculiar to New Orleans** in that all officers exercising the police power or administering the affairs of said corporation in whole or in part shall be elected either by the people, the City Council, or be appointed by the Mayor with consent of the Council."

If it be contended that, due to the difference between the language used in the Constitution of 1898 and 1913 and that used in the Constitution of 1921, the police power has not been delegated to the Commission Council, then the most that can be claimed, in so far as our contentions are concerned, is that it is, by the terms of Section 22 of Article XIV, the Constitution of 1921 left it to the Legislature to delegate the authority to exercise the police power within the City of New Orleans. And the fact is that by Act 93 of 1921 the Legislature had delegated this authority to the Commission Council of the City of New Orleans.

The pertinent portions of this act read as follows:

**Section 8.** "The Commission Council shall also have power:

"1. To order the ditching, filling, opening, widening and paving of the public streets and to regulate the grade thereof, etc.

\* \* \* \* \*

"12. To authorize the use of the streets for railroads operated by horse, electricity, steam or other motive power and to regulate the same, etc., and to compel all such companies to keep in repair the street bridges and crossings through or over which their cars run."

The right and power here sought to be exercised by the Commission is inconsistent with the terms of this Act of 1921, passed only a few months after the adoption of the Constitution of 1921, because the Commission is here attempting to constitute (unconditionally) as part of the



public streets a part of the viaduct in question; in other words, it is attempting to open a street in the City of New Orleans, and in addition, it is attempting to regulate the use of the streets by a steam railroad, the authority to do both of which is vested, by the act, exclusively in the Commission Council of the City of New Orleans. Unless this act is declared unconstitutional, and it is not even so contended, then the power to do the things here sought to be done by the Public Service Commission is vested in the Commission Council of the City of New Orleans.

There are other provisions of the city charter which show that it was and is the intention of the law-makers of the State of Louisiana that such power shall be vested solely in the Commission Council of the City of New Orleans.

Act 159 of 1912 (charter of the City of New Orleans):

**Section 1.** "(d) The legislative, executive and judicial powers of the city shall extend to all matters of local and municipal government, it being the intention thereof, that the specifications of particular powers by any other provision of this charter shall never be construed as impairing the effect of the general grant of powers of local government hereby bestowed.

"(e) The city shall also have all powers, privileges and functions which by or pursuant to the Constitution of this State have been, or could be granted to or exercised by any city.

"(f) All powers of the city shall, except as otherwise provided in this charter, be vested in its

elective officers, subject to distribution and delegation of such powers as provided in this charter or by ordinance."

**Section 6.** "The Commission Council shall have the power, and it shall be their duty, to pass such ordinances, and to see to their faithful execution, as may be necessary and proper:

"1. To preserve the peace and good order of the city.

"2. To maintain its cleanliness and health and to this end \* \* \*

"(c) \* \* \* and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health and to prevent the spread of disease and to maintain a good sanitary condition in the streets, public places and buildings and on all private premises.

\* \* \* \* \*

"(d) To suppress all nuisances.

"3. **To open and keep open and free from obstruction all streets, public squares, wharves, landings, lake shore and river and canal banks.**

"4. **To keep the streets and crossings and bridges and canals and ditches clean and in repair."**

Not only is the Commission here seeking to exercise powers conferred exclusively on the Commission Council of the City of New Orleans, but it is seeking to exercise a power which it has no right to exercise in any part of the State, namely, that of eminent domain.

The right to cross the Morgan Company's property was granted without any compensation being paid to the Mor-

gan Company, but under the condition that the city maintain it. The attempt of the Louisiana Public Service Commission to wipe out this condition, and to leave the viaduct as a public crossing constitutes an attempt to appropriate a crossing across the Morgan Company's property without compensation. No provision of the Constitution or laws of the State of Louisiana granting such power has been pointed out, because none exists. We will discuss this point more at length in the next section of this brief.

We submit it is clear from the foregoing, and for the reasons given by the trial Court, that the Commission is here seeking in effect to open and repair a public street in the City of New Orleans, to control and regulate the use by a steam railroad of the streets of New Orleans and to exercise the power of eminent domain, that it has no authority or power so to do and that the decree appealed from should be affirmed.

(C.)

**EVEN IF THE LOUISIANA PUBLIC SERVICE COM-  
MISSION BE HELD TO HAVE THE POWER HERE  
SOUGHT TO BE EXERCISED, IS THE ORDER  
COMPLAINED OF A VALID EXER-  
CISE OF THAT POWER?**

The determination of this question involves a consideration of our contentions that the order deprives the Morgan Company of its property without due process of law; that it violates Section 2 of Article One of the Constitution of the State of Louisiana; that it denies to the Morgan Com-

pany the equal protection of the laws; that it renders null and void and of no effect the obligation of the City of New Orleans under the contract by which the City of New Orleans obtained the right to cross the Morgan Company's property; that it releases and extinguishes the obligation of the South New Orleans Light & Traction Company to the City of New Orleans in violation of the provisions of Section 13 of Article 4 of the Constitution of the State of Louisiana; that the order is unjust, arbitrary and unreasonable, and there is no public necessity therefor, and that the order constitutes the taking of petitioner's property without compensation, for the benefit of the South New Orleans Light & Traction Company, in violation of the Fourteenth Amendment to the Constitution of the United States, and also of Section 2 of Article One of the Constitution of the State of Louisiana.

As the same set of facts form the basis for discussion of the various questions of law just above mentioned we will treat all of these questions of law in this one subdivision of this brief.

Section 2 of Article One of the Louisiana Constitution of 1921 reads as follows:

"No person shall be deprived of life, liberty or property except by due process of law, except as otherwise provided in this Constiution. Private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

The exceptions referred to in this Article are generally those which refer to certain property which on account of its location is burdened with a servitude in favor of the public, such as property fronting on the Mississippi River which owes a servitude to the public, outside of the City of New Orleans, along the river bank of space for a public road.

There is no provision in the Constitution or elsewhere in the laws of Louisiana authorizing the taking of property used for railroad purposes or owned by railroad corporations for a street or crossing without just and adequate compensation previously paid.

The rights of the public in this regard are, under the laws of Louisiana, subject to the same limitations as apply to the taking of property belonging to individuals and used for farm or other purposes, namely, that it cannot be taken for public purposes unless just and adequate compensation be previously paid.

Under the law of Louisiana private property cannot be taken for a public road without just and adequate compensation being previously paid to the owners.

Revised Statute Section 1479 as amended by Act 123 of 1910, page 194 reads as follows:

"Whenever the State or any political corporation of same created for the purpose of exercising any portion of the governmental powers in the

same, \* \* \* cannot agree with the owner of land which may be wanted for its purchase, it shall be lawful for the State, corporation \* \* \* to apply by petition to the District Court in which the same may be situated \* \* \* describing the land necessary for the purposes with a plan of the same and a statement of the improvements thereon, if any, and the name of the owner thereof, if known, at present in the State with a prayer that the land be adjudged to such State, corporation \* \* \* upon payment to the owner of all such damages as he may sustain in consequence of the expropriation of said land for public works.  
\* \* \* ."

Act 49 of 1910 which refers to laying out, opening, constructing and repairing public roads in the country parishes and cities in Louisiana other than New Orleans provides by Section 14:

"That in all cases where it is necessary to acquire a right of way in constructing a new highway or change the location of an old, the right of way thereof shall be acquired by the parish, city, town or village, either by purchase, donation or by expropriation under the general laws of the State relative to expropriation of private property for public purposes, in the event the owner of said property and the governing authorities of such cities, towns and villages or the State Highway Engineer should not agree upon the price thereof."

It will thus be seen that, under the general law of the State, the right to cross the Morgan Company's property

could not have been and cannot now be acquired, in the absence of agreements, except by expropriating such right and by making just and adequate compensation therefor, and this applies whether the taking be by the City of New Orleans or the Louisiana Public Service Commission or any other public body, as no exception is made either in the Constitution of the State or in the general law of the State in favor of either the City of New Orleans, the Louisiana Public Service Commission or any other public body.

In the case of *State Ex Rel. Cotting v. Summerville*, 104 La., 74 (88) (28 Southern 977), the Court held:

"If relator was entitled, under the Constitution, to retain possession of his property during expropriation proceedings instituted under the right of eminent domain, until just and adequate compensation should be first made to him, that right could not be defeated by mere consideration of public convenience. In *Bruning v. New Orleans Canal & Banking Co.*, 12 La., 541 (repeated in *Dudley v. Tilton*, 14 La., 286), and *Kirk v. Kansas City S. & G. Ry. Co.*, 51 An., 682, it was held that usurpations and wrongs to private right of property cannot be justified by any considerations of benefits to commerce, and the right of expropriation of private property can only be exercised according to the forms of law."

It is clear, from the evidence that the property of the Morgan Company which is crossed by this viaduct is owned by the Morgan Company by fee simple title; has been un-

der fence and in the sole and exclusive possession of the Morgan Company, and the public has been excluded therefrom for over forty years and that no street has ever been opened across it and no right to cross it has ever been granted except the right granted to the City of New Orleans to cross the property with a viaduct under the condition that the viaduct be maintained by the city. For this conditional right the city paid no compensation.

When in 1905, in the judgment of the Council of the City of New Orleans a crossing across petitioner's property was necessary for public convenience and a viaduct necessary for public safety, the city was free to acquire the right to cross either by contract or by expropriation, the latter course requiring that the city previously pay to plaintiff just and adequate compensation for property taken and the damage to plaintiff's adjacent property. The city found it to its interest to pursue the former course, and the plaintiff gave the crossing to the city under the condition that the city pay the cost of construction of, and maintenance of, the viaduct; the Morgan Company bearing the entire expense of rearranging its facilities and improvements in order to admit of the crossing and receiving nothing from the city for the crossing itself.

This agreement was to the advantage of the city because it had already by contract bound the Algiers Street Railway Company, predecessor of the South New Orleans Light & Traction, to pay part of the cost of construction and all of the cost of maintenance.



The effect of the order here complained of is to set aside and render null and of no effect the contract entered into between the City of New Orleans and the Morgan Company, under which the crossing was granted, and the viaduct constructed, and if the order complained of is upheld the Morgan Company will find itself with a crossing across its property without just and adequate compensation being made therefor. The public, whether represented by the Louisiana Public Service Commission or the Commission Council of the City of New Orleans has no greater right over, into or upon the Morgan Company's property than is contained in the donation of the right of way for the crossing. To hold otherwise would permit the public to acquire plaintiff's property by what would amount to legal fraud.

The Supreme Court of the State of Louisiana in two well considered cases has set its face against the public acquiring property in any such unconscionable manner.

The case of *Voinche v. Town of Marksville*, 124 La., 712 (50 So., 662), is a case in which the ancestors of plaintiffs had donated to the Town of Marksville a piece of property under the condition that it be used for the permanent establishment and maintenance thereon of a market house and for no other purpose. The Town took the property, built a market house on it, subsequently abandoned the market house and devoted the property to other use. The heirs of Voinche sued to revoke the donation and obtain

possession of the property and the Supreme Court upheld their contention, and said:

"No analogy between a sale and a donation of property exists as to charges and conditions that may be imposed by the grantor. The donor may impose on the donee any charges or conditions he pleases, provided they contain nothing contrary to law or good morals. Civ. Code, Art. 1527. Donations *inter vivos* are liable to be revoked or dissolved on account of the non-performance of the conditions imposed on the donee. Id. Art. 1559. The word 'conditions,' as used in this article, is synonymous with the word 'charges'; and when a donation contains charges it is considered as made under the condition that it may be dissolved or revoked if they are not executed. Mourlon, Examen Du Code Napoleon, Vol. 2, p. 366. 'Conditions' means charges or obligations of the donee. Dalloz, Repertoire de Legislation, Supplement 5, No. 404, p. 149. Hence, if the town of Marksville was charged or obliged by the act of donation with the duty of establishing and maintaining a public market on the lot donated a clear case of nonperformance is alleged in the petition."

This language is particularly apposite to the case at bar because the Town of Marksville had the right, if it so desired, to expropriate the property for the purpose of constructing thereon a public market, as did the City of New Orleans for a crossing.

In the case at bar one of the conditions of the donation to the City of the right of way for the viaduct was that the City should maintain the viaduct. That there is noth-

ing contrary to the law and good morals can be no better shown than by the fact that the Court held that a similar stipulation in the donation by Voinche to the town of Marksville, namely, that it should establish and thereafter maintain a public market on the donated property, was not contrary to law and good morals.

The same principle and the same law which the Court in the Marksville case concluded gave the right to the heirs of the donor to revoke the donation to the town of Marksville give the right to the Morgan Company in the case at bar to revoke the donation of the right of way to the City on the failure of the City to execute the "charges" set forth in the donation, namely, to maintain the viaduct, and this Court, therefore, cannot consider the right to cross as having been acquired by the public without limitation, and should conclude that the right to cross is subject to the condition that the viaduct be maintained without expense to plaintiff and is terminable on the failure of the City to live up to this obligation.

Another case in point is that of *In Re New Orleans Auxiliary Sanitary Association*, 105 La., 173.

In this case the Court also answered the contention made by the Commission in the case at bar that because the property of the Morgan Company is used for railroad pur-

poses it thereby became dedicated to public use and that the right to cross could be enforced without compensation therefor. Answering this proposition the Court said:

"The proposition stated ignores the fact that while the purposes for which the association was established was public, the association itself was a private corporation, capable, in law, of owning property and incurring debts in its corporate capacity."

The Supreme Court of the State of Louisiana also held in the case of *V. S. & P. R. R. Co. v. Monroe*, 48 La., 1102, that because property is devoted to railroad purposes a municipality in the State of Louisiana cannot, without expropriating the same and making compensation therefor, take any part thereof for public streets, and this even though the railroad company itself had expropriated the property in question.

In the case of *Northern Pacific Railway Company v. Minnesota*, 209 U. S. 583, this Court announced the doctrine for which we now contend:

Page 590. "It is no longer open to question that municipal legislation passed under supposed legislative authority from the State is within the prohibition of the Federal Constitution and void if it impairs the obligation of contracts."

The same principle applies to orders of the Louisiana Public Service.

Page 590. "In cases arising under this clause of the Constitution this Court determines for it-

self whether or not there is a contract valid and binding between the parties, and whether its obligation has been impaired by the legislative action of the State.

**Page 591.** "The legislation which deprives one of the benefits of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract, etc."

In this case (*208 U. S. 583*) this Court found that the crossing over which the viaduct was constructed was an existing crossing at the time it was originally constructed and that the contract whereby the municipality agreed to maintain the viaduct was void because it amounted to an attempt to contract away the police power. The Court assumes, in all the discussion, that compensation had or must be made for the property taken for the crossing, as will appear from the language used on page 595.

In the case at bar no compensation has been paid for the property taken and the property damages by the crossing and under the principles upheld and announced in the *Sanitary Company* and the *Marksville* cases, *supra*, the contract between the City of New Orleans and the plaintiff is binding.

While this Court has not passed on a case in which a railroad company was sought to be required to give a new crossing without compensation the Circuit Court of Appeals for the Eighth Circuit has done so in the well-reasoned case of *Atchison, Topeka & Santa Fe v. City of*

*Shawnee*, 183 Fed., at page 85, and the principles there upheld are clearly applicable to the case at bar.

If it could be held that under any law of Louisiana the Morgan Company could be required, without compensation, to give to the public a crossing across its property, then such law would be void because all other property holders would be receiving such compensation and the Morgan Company would not.

The order complained of seeks to bring this situation about.

We submit that the order complained of is void because it violates the Fourteenth Amendment to the Constitution of the United States and also Section 2 of Article One of the Constitution of the State of Louisiana in that it deprives the Morgan Company of its property without due process of law, and it denies to the Morgan Company the equal protection of the laws and that it also violates Section 10 of Article One of the Constitution of the United States in that it impairs and renders null and void and of no effect the obligations of the contract between the City of New Orleans and the Morgan Company under which the right to cross was granted by the Morgan Company.

We also contend that the order is null because it impairs the obligation of the contract between the city and the South New Orleans Light & Traction Company according to the provisions of which the Traction Company is obligated to maintain the viaduct in all its parts.

That the City of New Orleans has and had at the time this franchise was granted the power and authority to grant it, is certainly too clear to require argument or authorities to support it. That the City had the right to impose such reasonable burdens upon the grantees and their successors as in the judgment of the City seemed best is also equally clear. That the city had the right and power to impose upon the grantees and their successors the entire burden of maintaining the viaduct is made clear by the decision of the Supreme Court of the United States in the case of *Missouri Pacific Railroad Company v. Omaha*, 235 U. S. 121, in which the court said, on page 129:

"Where a number of railroads have contributed to the condition which necessitates such improvements (a viaduct) in the interest of public safety it is not an unconstitutional exercise of authority, as this Court has held, to require one of the companies to perform such work at its own expense."

The city having, in the exercise of the discretion vested in it, seen fit to impose the burden of maintaining this viaduct upon the street railway, any order of the Commission the effect of which would be, as would the present order, to relieve the street railway of this obligation, would necessarily impair the obligation of the contract between the city and the street railway, and would therefore be null and void.

In addition to the foregoing, Section 13 of Art. IV of the Louisiana Constitution of 1921, provides:

"The Legislature shall have no power to release or extinguish or to authorize the releasing or

extinguishment, in whole or in part, of the indebtedness, liability or obligation of any corporation or individual to the State or to any parish or municipal corporation thereof, etc."

Now, if the Legislature is without power to relieve the South New Orleans Light & Traction Company of its obligation to maintain the present viaduct, the City of New Orleans, a creature of the Legislature (except as protected by Sec. 22 of Art. XIV of 1921 Constitution), has no such power. If neither the City of New Orleans nor the South New Orleans Light & Traction Company can amend the latter's franchise in this particular, then the Louisiana Public Service Commission should not be permitted to do indirectly what the parties themselves are prohibited from doing directly.

An examination of the record of the proceedings before the Louisiana Public Service Commission warrants the conclusion, we believe, that while they were instituted in the name of Citizens of Algiers, they were instigated by the South New Orleans Light & Traction Company in the hope of relieving itself of the obligation of maintaining the present viaduct and of the increased burden resulting from its having failed to live up to its obligation in the past.

If the present order is upheld it will be successful.

Its president and counsel were present throughout the proceedings, and from an examination of the testimony of



Mr. Burges, its president, it is clear that he worked up the case and prepared all the data.

In the case of *Lochner v. New York*, 198 U. S. 45, this Court said, on page 64:

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber*, 136 U. S., 313; *Brinner v. Rebman*, 133 U. S., 73. The Court looks beyond the mere letter of the law in such cases. *Yick Wo v. Hopkins*, 118 U. S., 356."

(D)

Even if we be incorrect in all of our other contentions made in this case we believe that but little argument is required to show that the order is so unjust, arbitrary and unreasonable and that there is no public necessity therefor as to render the order illegal.

The viaduct in question is some two thousand feet in length. The record shows that at the time of the trial in the lower Court it was in such a bad state of repair as to render it unsafe for vehicular traffic over portions of its length not located over defendant's property, so that the order required the Morgan Company to repair a portion of the viaduct, which said portion is more than twenty feet in the air without providing for the repair of the other portions of the viaduct, so that if the portion of the viaduct over the Morgan Company's property is repaired and thereafter maintained as ordered, it would constitute practically an elevated bridge without any approaches thereto and could, therefore, not be used by the public as a crossing; in other words, the doing of the things ordered to be done in the order complained of would advantage the public not at all and the cost thereof would be a vain and useless expenditure of money.

For the foregoing reasons we respectfully submit that the decree appealed from should be affirmed.

The cases of *Vandalia R. Co. v. State*, 166 Ind., 219; 76 N. E. 980, 117 A. S. R. 370; *State v. District Ct.*, 42 Minn. 247; 44 N. W., 7; *L. R. A.*, 121; *State v. St. Paul, etc., R. Co.*, 98 Minn., 380; 108 N. W., 261; 120 A. S. R., 581; 8 Ann. Cas., 1047; 28 L. R. A. (N. S.), 298, cited on page 23 of the brief of the Commission have no application to the case at bar because they were cases in which the crossings referred to were existing crossings to which the public had an unconditional right, whereas in the case at bar the right of the

public to cross is conditioned on the city's maintaining the viaduct.

The cases *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct., 581, 41 L. Ed., 979; *Northern Pacific R. Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct., 341, 52 L. Ed., 630; *Cincinnati, etc., R. Co. v. Connersville*, 218, U. S., 336, 31 Sup. Ct., 93, 54 L. Ed., 1060; 20 Ann. Cas. 1206, and note; *Chicago, etc., R. Co. v. Minneapolis*, 232 U. S., 34 Sup. Ct., 400, 58 L. Ed., 671; *Missouri Pacific R. Co. v. Omaha*, 235 U. S. 121, 35 Sup. Ct., 82; 59 L. Ed. 157; *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E., 584; 43 L. R. A., 638; *Vandalia R. Co. v. State*, 166 Ind., 219; 76 N. E., 980; 117 A. S. R., 370; *Portland, etc., R. Co. v. Deering*, 78 Maine, 61; 2 Atl., 670, 57 Am. Rep., 748; *State v. St. Paul, etc., R. Co.*, 98 Minn., 380, 108 N. W., 261, 120 A. S. R., 581, and note; 8 Ann. Cas. 1047, and note; 28 L. R. A. (N. S.), and note; *Houston, etc., R. Co. v. Dallas*, 98 Tex. 396, 84 S. W., 648, 70 L. R. A., 850, cited on pages 23 and 24 of the brief of the Commission are not applicable because in each case either the Court was referring to an existing crossing to which the public had an unconditional right, or in the very proceeding itself the right to cross was being expropriated and compensation paid therefor, whereas in the case at bar the existing right to cross is conditional, no attempt is being made to expropriate the right to cross and no compensation is being paid for the right to cross.

While it is stated on page 36 of the Commission's brief the crossing involved in the case of *Gulf Colorado and Santa*

*Fe R. Co. v. Louisiana Public Service Commission*, 151 La., 635 (92 So., 123), was a new crossing, the opinion of the Court does not so show, and the Court did not treat it as a new crossing, but considered it as an existing crossing; but even if it be considered as a new crossing, that case would not militate against the principles for which we contend, for the reason that if the plaintiff in that case did not raise or the Court did not pass on the question of the right to require a railroad company to grant a new crossing, free of charge, that decision cannot be considered as authority for such a proposition. In any event, such action by the Court would then deprive the railroad company of its property without due process of law.

The authorities cited by the Commission in its brief that the police power of the State cannot be bartered or contracted away have no application to the case at bar because we are not contending that the unconditional right to cross cannot be acquired in proper proceedings, we are merely contending, first, that the proper state agency, to-wit, the City of New Orleans has not taken any steps to acquire the unconditional right to cross, and second, until it does acquire such unconditional right, the condition under which the right to cross was granted must be complied with.

The case of *Atlantic Coast Line v. City of Goldsboro*, 232 U. S. 548 has no application because in that case the railroad company had devoted a part of its right of way to public use inconsistent with (and without conditions) railroad purposes, whereas, in the case at bar, the public has ac-

quired only a conditional right to use the Morgan Company's property, and for the further reason that the Commission in this case is not seeking to require the Morgan Company so to use its other property as not to endanger the public, but it is seeking to wipe out the condition under which the right to cross was acquired and to exercise authority over the viaduct, the right to exercise which is delegated to the Commission Council of the City of New Orleans.

The contention of the Commission (pp. 51, *et seq.*, of its brief) that the Morgan Company is obligated, by Section 7 of its Charter, is answered by a reading of the section itself. It clearly and exclusively refers to streets, etc., existing at the time of construction of the railroad, and by requiring it to repair such streets, etc., as it may "pass upon, along or intersect, touch or cross," it cannot fairly be held to be required to extend, free of charge, and maintain, across its property a street that merely touches the edge of its property.

The argument found in the Commission's brief, pp. 28 to 37, is based on two erroneous assumptions: first, that the Commission is competent to render the order complained of, and, second, that the public has acquired the unconditional right to cross the Morgan Company's property. The authorities cited in this portion of the brief are not pertinent because in each case the Court was dealing with either an existing street or crossing, the unconditional right to use which was vested in the public, or in the very

proceeding under consideration the unconditional right to cross was being expropriated and paid for. The same is likewise true of the contentions made and decisions cited on pages 37 to 42 of the Commission's brief.

There is no force in the contention that the Louisiana Public Service Commission has the power to render the order here complained of, merely because it is the Public Service Commission, for the reason that it has only such powers as have been delegated to it by statutory or constitutional provision and because the Courts of other States, in construing their laws conferring power on a similar body, have held such body to have the power, is no reason or authority for giving the differently worded laws of the State of Louisiana the same construction.

From the foregoing we submit that it is clear that this is not a case in which a railroad company is seeking to have set aside an order rendered by competent authority to require it to maintain a viaduct across its tracks on a public street, but is a case in which the railroad company is seeking to have set aside an order rendered by a board without power so to do requiring it to repair a viaduct across its property, property which it owns in fee simple, property which it has had under fence for over forty years, property from which the public has been excluded and over which the public has never acquired any rights except under conditions which are violated and ignored by the order complained of.

We submit, further, that this is not a case involving the power of a municipality or other properly constituted authority to disregard a contract by the terms of which it obligated itself to pay the cost of and thereafter maintain a viaduct across a railroad company's tracks along a public street, but is a case in which a municipality, instead of expropriating a street across a railroad company's property and paying the value of the property so taken, together with the damages to the railroad company's remaining property resulting from the taking, entered into a contract with the railroad company, as it had a right to do, whereby the railroad company granted to the municipality the right to cross under the condition that the municipality would pay the cost of, and thereafter maintain, the viaduct to be constructed.

This is a case in which a municipality, as it had the right to do, required a street railroad company to pay the entire cost of the maintenance of the viaduct; a case in which a Commission, without authority so to do, seeks to require plaintiff unconditionally and without compensation, to give a crossing across its property and to repair a viaduct constructed thereon under the condition that it would be maintained by the city.

In other words, the Louisiana Public Service Commission in the case at bar is seeking to do indirectly what neither it nor the City of New Orleans has the right or power to do directly, namely, to set aside and ignore the contractual conditions under which the right to cross was granted,

and to shift from the shoulders of a street railroad company, where the city in the exercise of a proper power not only has decreed it should rest, but has so contracted with the street railroad company, to the shoulders of a steam railroad.

For the foregoing reason we respectfully submit that the decree appealed from herein should be affirmed.

GEORGE DENEGRE,  
VICTOR LEOVY,  
HENRY H. CHAFFE,  
HARRY McCALL,  
JAS. HY. BRUNS,

Attorneys.

DENEGRE, LEOVY & CHAFFE,  
Of Counsel.